

If a retailer is located in a jurisdiction that has an enterprise zone ordinance restricting the scope of the enterprise zone exemption, then such ordinance restrictions will apply to and control the taxability of all sales of building materials made in that jurisdiction. See 86 Ill. Adm. Code 130.1951(a) and (c). (This is a PLR).

June 10, 2002

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of March 29, 2002 and additional information sent June 7, 2002. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, AAA, we respectfully request that the Illinois Department of Revenue issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code Section 1200.110 with respect to the following factual situation.

General Information

1. Enclosed please find an original Form IL-2848 Power of Attorney, authorizing FIRM to represent AAA before the Illinois Department of Revenue (the 'Department').
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the Retailer's Occupation Tax and Use Tax consequences of the actual business practices of AAA.
3. AAA is not currently engaged in litigation with the Department in regard to this or any other tax matter.
4. AAA is not currently under audit by the Department in regard to any tax matter.
5. To the best knowledge of AAA's personnel, the Department has not previously ruled regarding this matter for AAA. In addition, AAA has not submitted the same or similar issue to the Department.
6. AAA requests that certain information be deleted from the PLR prior to dissemination to others. AAA requests that its name, address, location of its facility and the name of its representative be deleted.

7. AAA knows of no authority contrary to the authorities referred to and cited below.

Statement of Material Fact

1. AAA is an Illinois retailer subject to Illinois Retailers' Occupation Tax and Use Tax, registered and doing business at ADDRESS.
2. AAA has established a legal entity, BBB to enter into a construction agreement with an independent third party contractor to build a new electricity generating facility.
3. Upon completion, BBB will operate the new natural gas fired simple-cycle electricity generating facility (hereafter referred to as the 'facility')
4. The facility is located within the Enterprise Zone.
5. BBB will purchase certain building materials from AAA (see description of materials below) required for the facility and will enter into a construction contract for the installation of these materials. The construction contract for these materials will be solely for the installation of the materials by an unrelated contractor.
6. AAA and BBB have established procedures in order to satisfy the requirements as provided in 86 Illinois Administrative Code Section 130.1951 to qualify for the 'enterprise zone building materials exemption.' Please refer to Attachment A for the specific procedures that have been designed to procure the building materials.
7. The following items represent the significant materials that will be purchased from AAA, a retailer within CITY, by BBB for incorporation into the facility. Attachment B provides a more expansive description of these items and the manner in which they are affixed to the realty. These materials will be referred to hereinafter as 'the building materials':
 - a) Concrete foundations for building and equipment support;
 - b) Eight (8) natural gas fired gas turbine generators;
 - c) Electrical transformers, breakers, switch gear, duct banks, and electrical cabling;
 - d) Piping for water and natural gas supply;
 - e) Turbine control compartments; and
 - f) Two (2) buildings that house the electrical, mechanical and control equipment for the entire facility.

Ruling Requested

1. The procedures established by AAA that are identified in Attachment A meet the requirements provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Section 130.1951 in order to qualify for the sales tax deduction for the sale of building materials to be incorporated into realty within an enterprise zone.
2. The major materials identified and described in Attachment B qualify as 'building materials' for the purpose of the Retailers' Occupation Tax deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Section 130.1951(a)(7).

Relevant Authorities

The Illinois Retailers' Occupation Tax Act [35 ILCS 120/2] imposes a tax on persons engaged in the business of making retail sales of tangible personal property. In accordance with Section 2-10 of the Act, this tax is measured by a seller's gross receipts [35 ILCS 120/2-10]. Pursuant to Section 5k of the Act [35 ILCS 120/5k], a retailer whose place of business is located within a county or municipality which has established an enterprise zone and makes sales of 'building materials' to be incorporated into real estate within the enterprise zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

In order to qualify for the exemption provided in 35 ILCS 120/5k, certain procedural and documentation requirements must be satisfied. The retailer must be located in the municipality or unincorporated area of the county that established the enterprise zone into which the building materials will be incorporated. 86 Ill. Admin. Code Section 130.1951(a)(2) provides that this requirement will be satisfied if, at the time of the sale, the retailer:

- 1) has an identifiable presence in the municipality or unincorporated area of the county that has established the enterprise zone.
- 2) is registered as a retailer at a location in the municipality or unincorporated area of the county that has established the enterprise zone.
- 3) is able to document the acceptance of purchase orders at the registered location in the municipality or the unincorporated area of the county that established the enterprise zone.

86 Ill. Admin. Code Section 130.1951 further provides that two separate transactions must exist independent of each other and must properly be documented. The transactions are:

- 1) a sale from the supplier to the retailer who is located in the jurisdiction that created the enterprise zone; and
- 2) a sale from the retailer who is located in the jurisdiction that created the enterprise zone to the purchaser.

The following documentation establishes a sale from a supplier to a retailer who is located in the jurisdiction that created the enterprise zone:

- 1) a purchase order issued by the retailer to the supplier;
- 2) a Certificate of Resale issued by the retailer to the supplier;
- 3) an invoice from the supplier to the retailer; and
- 4) evidence of payment to the supplier from the retailer.

The following documentation establishes a sale from the retailer who is located in the jurisdiction that created the enterprise zone to a purchaser:

- 1) a purchase order issued by the purchaser to the retailer;
- 2) an exemption certificate issued by the purchaser to the retailer certifying that the materials will be incorporated into realty within the enterprise zone;
- 3) an invoice from the retailer to the purchaser; and
- 4) evidence of payment to the retailer from the purchaser.

To meet the above requirements, AAA maintains a physical presence in CITY, Illinois. As indicated in Attachment A, AAA will receive, accept and approve purchase orders or enter into sales contracts at that location. AAA will purchase for resale the building materials that will be incorporated into realty within the enterprise zone. AAA will resell the building materials to BBB. BBB will in turn contract for the installation and erection of the materials.

The facts indicate that the procedures established by AAA, and provided in Attachment A, satisfy the requirements set forth in 86 Ill. Admin. Code Section 130.1951. Therefore, AAA may make tax-free sales of qualifying building materials to BBB that will be incorporated into realty within the Enterprise Zone.

In order to qualify for the deduction as provided in 35 ILCS 120/5k, the materials must constitute 'building materials' as provided in 86 Ill. Adm. Code Sec. 130.1951(a)(7).

86 Ill. Admin. Code Sec. 130.1951(a)(7) provides:

In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for *physical incorporation* into real estate. (Emphasis added.)

Therefore, the question is whether the materials described in Attachment B will qualify as 'building materials,' that is, whether the materials are purchased for 'physical incorporation into real estate.'

The Department in Private Letter Ruling 99-0009 (March 9, 1999) ruled that pipe racks, pipe, supports, and piping tie-ins installed at a natural gas fired power plant would constitute 'building materials' under the Department's regulations because they were permanently affixed to real estate. Further, since the real estate was located within an enterprise zone such items incorporated into real estate could be purchased tax-free from qualified retailers.

In a more recent decision, the Department in Private Letter Ruling ST 00-0013 (July 7, 2000) found that certain materials incorporated into realty within an electricity generating facility qualified as building materials pursuant to the Department's regulations. The Department found that turbine generators, electrical transformers, electrical cabling, piping and other materials that are permanently affixed to real estate qualify as a 'building material' for purposes of the deduction provided in 35 ILCS 120/5k and 86 Ill. Admin. Code Sec. 1951(a)(1).

The facts and issues stated in ST 00-0013 are substantially similar to the issues at hand in this letter ruling request. The materials at issue here will be permanently and physically attached to the realty. Please refer to Attachment B for details on the method of affixation. Removal of the materials after affixation, including the gas turbine generators, would result in substantial damage to the materials and realty. The anchor bolts, which are embedded in the concrete foundation, would have to be removed. Removing the anchor bolts would cause damage to the anchor bolts, the foundation, the underground electrical cable and piping, and possibly cause damage to the gas turbine generator itself. Therefore, this demonstrates that the equipment, after being attached, is permanently affixed.

Conclusions

35 ILCS 120/5k provides that a retailer whose place of business is located within a county or municipality which has established an enterprise zone, and who makes sales of 'building materials' to be incorporated into real estate in that enterprise zone by remodeling, rehabilitation or new construction, may deduct receipts from such sales in the calculation of taxable gross receipts.

The deduction provided in 35 ILCS 120/5k is applicable to receipts from the sales of 'building materials.' In order to qualify as 'building materials,' the items must be physically incorporated into real estate.

The materials in question qualify as 'building materials' for purposes of the deduction provided in 35 ILCS 120/5k. The materials are physically and permanently incorporated into realty as described in Attachment B. Therefore, since the materials qualify as building material and are incorporated into realty within an enterprise zone, the materials may be purchased from a qualifying retailer free from Retailers' Occupation Tax and Use Tax.

We respectfully request that the Department issue a ruling stating that the procedures outlined in Attachment A satisfy the Department's regulations, found at 86 Ill. Admin. Code Section 130.1951 to qualify for the Enterprise Zone deduction and that the materials described in Attachment B qualify as 'building materials' for the purposes of the deduction provided in 35 ILCS 120/5k.

If the Department can not conclude that the procedures outlined above conform to the Department's regulations or that the materials qualify as 'building materials,' I request the Department contact me to determine what additional information is required or allow the taxpayer to rescind this ruling request.

Public Act 91-954, which became effective January 1, 2002, amended the Retailers' Occupation Tax to remove the requirement that retailers must be located within a jurisdiction establishing an enterprise zone in order to deduct sales receipts from the sale of building materials to be incorporated into real estate in such enterprise zone. The Department of Revenue recently adopted changes to its regulations governing enterprise zones to include and further explain the amendment made by Public Act 91-954. Please find enclosed, for your reference, a copy of 86 Ill. Adm. Code 130.1951, Enterprise Zones.

Effective January 1, 2002, a retailer is no longer required to be located in the municipality or county that created the enterprise zone into which the building materials are to be incorporated in order to take the deduction. However, this expansion of the deduction is not without some restrictions.

If a retailer is located in a jurisdiction that has an enterprise zone ordinance restricting the scope of the enterprise zone exemption, then such ordinance restrictions will apply to and control the taxability of all sales of building materials made in that jurisdiction. See 86 Ill. Adm. Code 130.1951(a) and (c).

Therefore, restrictions or the absence of restrictions in effect for the enterprise zone into which the building materials will be incorporated are of no consequence to the taxability of the sale. One

must instead look to whether the jurisdiction *in which the retailer is located* has an enterprise zone ordinance that restricts the scope of the enterprise zone exemption. If the retailer's jurisdiction has an enterprise zone ordinance in effect, the sale can be made tax-free, subject to any restrictions in that ordinance. If the retailer's jurisdiction does not have an enterprise zone ordinance, or does have an enterprise zone ordinance but one that has no restrictions, then the sale can be made tax-free. See Section 130.1951(c)(1) through (3). In either event, the purchased materials must be incorporated into an Illinois enterprise zone and the purchaser must certify as such in writing to the retailer in order for the deduction to be claimed. The signed written statement from the purchaser must be kept with the retailer's books and records. See Section 130.1951(c)(6).

A retailer claiming the deduction as it exists on and after January 1, 2002 must have among its books and records a written statement signed by the purchaser setting out facts that establish the deduction. This purchaser's statement must contain the following information:

- A) a certification by the purchaser that the building materials being purchased are being purchased for incorporation into real estate located in an Illinois enterprise zone;
- B) a description of the building materials being purchased (this may be done by a cross reference to the retailer's invoice number);
- C) the location of the real estate into which the building materials will be incorporated (this may be done by reference to the street address of the real estate);
- D) the name of the enterprise zone in which that real estate is located; and
- E) purchaser's signature and date of signing.

Sales of building materials made in compliance with the scenario set forth in your letter will qualify for the enterprise zone exemption.

In the next part of the analysis we must determine whether the items being incorporated are building materials as defined in the regulations. Section 130.1951(a) states, in part, as follows:

- 7) In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for physical incorporation into real estate.

The Turbine that is delivered in major components to the site where it is constructed and permanently affixed to the foundation qualifies as a building material. The generator, which is delivered to the site where it is constructed and permanently affixed to the Generator foundation with anchor bolts, qualifies as a building material. The stack that is 82 feet in height and is attached to the Generator foundation with anchor bolts qualifies as a building material. The Air Inlet System, which is attached to a foundation constructed on top of the Generator foundation with anchor bolts and that is hardwired to underground and above ground cabling and piping, qualifies as a building material.

The electrical transformers that are attached with anchor bolts to a reinforced steel concrete foundation qualify as building materials. The generator circuit breakers and the medium voltage cell structure that is attached to a support foundation with anchor bolts qualify as building materials. Electrical cabling housed in conduit and encased in a "duct bank" which is concrete housing located 1 to 4 feet below the ground qualifies as a building material. The above ground electrical non-segregated bus duct that runs 15 to 27 feet in the air and are supported by a structural utility rack that is physically attached to concrete footings by anchor bolts qualifies as a building material.

The piping that is installed underground qualifies as a building material. The aboveground steel piping that is physically welded to supports that are in the foundation qualifies as a building material.

The turbine control center, the operations building and the power distribution center that are attached to the concrete foundation by anchor bolts qualify as building materials.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

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Associate Counsel

MAJ:msk
Enc.